FILED
APR 1 1 1966

No. 898

In the

SUPREME COURT OF THE UNITED STATES

October Term 1965

WARREN W. PERRY,

Petitioner,

v.

COMMERCE LOAN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARI

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING PURSUANT TO RULE 58

Comes Commerce Loan Company, by counsel, and petitions the Court for a rehearing of the decision of the Court rendered herein on March 7, 1966, and as grounds therefor states as follows:

POINT ONE

In Part I of its opinion the Court lauds the Chapter XIII remedy as a desirable *alternative* to straight bankruptcy. Certainly. But this obscures the issue. The issue is whether Congress intended Chapter XIII debtor relief proceedings to be available as a remedy *in addition to bankruptcy*. Most certainly not. Perry had the choice of Chapter XIII relief as an *alternative* to straight bankruptcy in 1959 and took

the straight bankruptcy route. Subsequently, he sought relief in this proceeding under Chapter XIII *in addition to* the relief already afforded him in straight bankruptcy. The *alternative* of bankruptcy was no longer available to him. No one is arguing with the concept that "Congress clearly intended to encourage wage earners to pay their debts in full, rather than go into straight bankruptcy," or that Congress has recognized that Chapter XIII is a highly desirable and "feasible way for the honest and conscientious debtor to pay off his debts rather than having them discharged in bankruptcy." What we are questioning is the fact the Court has somehow deduced from a 1959 House of Representatives Report expressing these concepts an intention on the part of Congress in 1938 (twenty years earlier) to make Chapter XIII extension plans a remedy *in addition to* bankruptcy. Standing on this bland anachronism the Court finds significance in the fact that the six-year bar was enacted 35 years prior to the adoption of Chapter XIII. Indeed it was and we will demonstrate that it was definitely the intention of Congress to fully incorporate the six-year bar into Chapter XIII as a prohibition against confirming extension as well as composition plans.

It is true that the annual return to creditors under extension plans is currently well over $26,000,000.00. It is also true that in the majority of the wage earner cases the creditors would receive nothing if the debtor resorted to straight bankruptcy. But the Court stopped too soon with this reasoning process for it to be applicable to this case. The debtor in this case cannot resort to bankruptcy. The creditors are assured of payment in any event. Therefore, the drop in the Chapter XIII filings in the Sixth Circuit as a result of this case is of no legal significance since it does not follow that creditors are not being paid simply because repeater wage earner cases are not being filed. The Sixth

Circuit is on course with the Congressional purpose to prevent a class of habitual bankrupts. A collision course has just been charted by this Court.

The Court suggests that many debtors choose bankruptcy because they are unemployed and consequently have no earnings to use for extension arrangements, have an inextricably large indebtedness, or are simply unaware of the existence of an alternative to straight bankruptcy. There are some studies which tend to refute all these popular assumptions. See Occasional Paper No. 15, An Analysis of Economic and Personal Factors Leading to Consumer Bankruptcy by Robert Dolphin, Jr., Bureau of Business and Economic Research, Graduate School of Business Administration, Michigan State University, East Lansing, Michigan, 1965.

But we are here dealing with a specific case which also refutes these assumptions. In 1959 when Perry went into straight bankruptcy he was gainfully employed by Webb Texaco Service, 801 Elm Street, Ludlow, Kentucky. His total debts were $950.46, hardly inextricably large. He was represented by a prominent Northern Kentucky attorney. Since most of the Court's assumptions are unavailing, can relief now be justified on the ground the debtor or his attorney may not have known about a law that had been on the books 20 years?

POINT TWO

The intention of Congress is to be derived from what Congress has rejected as well as what it has approved.

Wage earner amortization was first reflected in Section 75 of the Hastings-Michener bill (72nd Cong., 1st Sess.). The Hastings-Michener bill provision was necessarily vague as to terms, but a succession of bills thereafter introduced,

all sponsored by the National Retail Credit Association and introduced in Congress through its efforts, represented such an improvement over the previous one so that Chapter XIII of the Chandler Act, while not perfect, has required few amendments.

Following introduction of the provision in the Hastings-Michener bill, came the Lewis bill of the 73rd Cong., H.R. 9227, and the successive Chandler bills of the 74th and 75th Congresses, namely, H.R. 6140, 74th Cong., 1st Sess., H.R. 11219, 74th Cong., 2nd Sess., and H.R. 1981, 75th Cong., 1st Sess. The latter bill was revised by Messrs. Valentine J. Nesbit, Special Referee in Bankruptcy, Birmingham, Ala. and by R. Preston Shealey, Washington Representative, National Retail Credit Association (both since deceased), and by them presented on behalf of the National Retail Credit Association at a hearing before the House Judiciary Committee on June 4, 1937, when that Committee was considering the general bankruptcy revision bill. Hearings on the subject of wage earner amortization were held before the House Judiciary Committee on March 11, 1936, February 19, 1937, June 4, 1937, and January 19, 1938, and at each of these hearings the National Retail Credit Association was represented and presented facts in regard to wage earners' plans. As a result, when the general bankruptcy revision bill was approved on June 22, 1938, Chapter XIII of that bill, devoted entirely to wage earner amortization, marked the fruition of years of effort on the part of retail credit granters to enact into legislation an appropriate bankruptcy provision.

The National Retail Credit Association proposed certain amendments which were not accepted in the final draft of the law. Section 14 of H.R. 1981, 75th Congress, First Session, which had the complete endorsement of the association provided as follows:

> "(14) The Court shall confirm the plan if satisfied that . . . (c) *in the event of a composition,* that the debtor has not been guilty of any of the acts, or failed to perform any of the duties, which would be a ground for denying his discharge. . . ."

The words "in the event of a composition" do not appear in the final draft of the law. See Hearings on Revision of the Bankruptcy Act before the Committee on the Judiciary of the House of Representatives, 75th Congress, First Session, on H.R. 8046, at pages 51-66 of the transcript, specifically at pages 58-59, for the first draft of the law. See Hearings before a Subcommittee of the Commitee on the Judiciary of the United States Senate, 75th Congress, Second Session, November 23, 1937 - February 15, 1938, at pages 63-64, for the final draft of the law. The use of the term "guilty" may have been a legislative oversight, but the deletion of the words "in the event of a composition" can hardly be characterized as an oversight. What inference is to be drawn from the deletion of these words?

Congress obviously intended the six-year bar to apply to extensions as well as compositions. The other possible inference is that Congress intended to exempt both extensions and compositions from the six-year rule, but the Court has already rejected this latter possible thesis, and rightly so, because Congress made it clear in the same general revision of the Act in 1938, by amendment of Section 14 of the Act that a composition was tantamount to a discharge in bankruptcy. Consequently, the six-year bar, as recognized by Justice Harlan in his dissenting opinion, precludes confirmation of either type of plan where the debtor has received a discharge in bankruptcy in a straight bankruptcy proceeding commenced within the previous six years. By judicial fiat this court has inserted in Chapter XIII a proviso which Congress specifically deleted.

POINT THREE

Section 656(a) of the Bankruptcy Act, 11 U.S.C., Sec. 1056(a), containing the "guilty . . . acts" phraseology which the Court found sufficiently ambiguous to impel recourse to legislative purposes also contains the requirement that the Court must be satisfied the plan "is for the best interests of the creditors." This requirement is relatively easy to satisfy where there has been no previous bankruptcy. Obviously it is for the best interests of the creditors for the debtor to pay them rather than go into straight bankruptcy. But where the "escape hatch" of bankruptcy is not available to the debtor, how can it be found to be for the best interests of the creditors to require them to await the slow process of payment under a wage earner extension plan.

The Court should keep in mind that the retail merchants who sponsored this legislation were interested in having their radios, television sets and refrigerators paid for first and in full despite the fact these appliances may have greatly depreciated in value. They were not overly concerned about the doctors, grocer and others who were to wait at the end of the line for payment. The hearings above cited reveal it was envisioned by the association that the monies paid in by the debtor during the first 18 months of operation of the plan would be utilized to pay for their appliances, after which payment to other creditors might begin. Surely Congress did not intend for this latter class of creditors to wait at the end of the line more than once every six years while the debtor pays for his car and television set, when the usual collection procedures are available to such creditors and the debtor cannot escape payment through bankruptcy. Such would surely not be in the best interests of this latter class of creditors. Conse-

quently, it becomes brightly evident that Congress intended to open the umbrella of the United States District Court over the debtor only once every six years and intended to preclude him from Chapter XIII relief if he had previously been in bankruptcy.

POINT FOUR

The Referee who decided this case is a Chapter XIII enthusiast. He has written several articles on Chapter XIII which have appeared in the Journal of the National Association of Referees in Bankruptcy and the Kentucky State Bar Journal. The 1964 edition of Kentucky Legal Forms, Vol. 2, published by Banks-Baldwin Company contains a chapter by him instructing attorneys on how to file Chapter XIII cases. He sponsored a forum on wage earner plans at a Kentucky State Bar Meeting held in Lexington, Kentucky, three years ago. The Chapter XIII trustee in his district has furnished each attorney in the district with sample petition and forms for filing wage earner cases. The trustee's office is computerized. The computer is programmed to maintain records of all receipts and disbursements and to write checks addressed to creditors where sufficient funds are available in a particular case. The computer publishes in quadruplicate a monthly statement of the status of each case. His office has under administration approximately 425 active Chapter XIII cases in which approximately $25,000.00 monthly is disbursed to creditors. When the referee assumed office in 1961 less than 1% of the bankruptcy filings in the Eastern District of Kentucky were Chapter XIII cases. Now nearly 25% of the cases filed are debtor relief proceedings under Chapter XIII. Few referees have excelled his record in promoting wage earner filings.

In the Eastern District of Kentucky a trustee is appointed in every straight bankruptcy case. The trustee is under instruction to ask the bankrupt whether his attorney discussed with him the availability of relief under Chapter XIII. The predictable response to that question will now be: "Yes, but my attorney advised me he could no longer recommend that I take Chapter XIII and save my right to bankruptcy since I can now come back and file under Chapter XIII if the going gets tough again." The referee who decided this case was intent on carrying out the congressional purpose of encouraging debtors to go Chapter XIII the first time at bat. The opinion of this Court may well destroy Chapter XIII except as a resort for repeaters. The Court may adopt the attitude that experience has shown otherwise; there are two answers to this position. First, subsequent experience is hardly evidence of what Congress intended in 1938. Secondly, the statistics maintained by the Administrative Office of the United States Courts do not reveal what percentage of wage earner petitions are repeater petitions and consequently there is no way of telling how much of the $26,000,000.00 disbursed by Chapter XIII trustees would have been paid in any event.

The language at page 7 of the Court's opinion characterizing as "illogical" the Referee's application of the six-year bar at the time of confirmation of an extension plan might well be interpreted as an exercise in name calling directed at numerous members of the Federal Judiciary who have disagreed with the Court on this point. Such language hardly contributes to the solution of this matter since everyone eternally vows that logic is on his side. Moreover, this is a sociological rather than a logical prob-

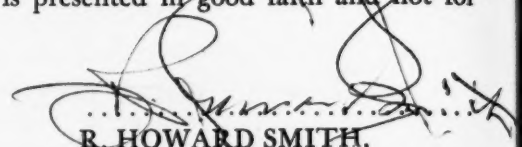
lem. Congress considered this problem in 1938 and rejected "Hospitality for Repeaters."

POINT FIVE

The Court's attention is directed to Paragraph 1 of the debtor's plan in which he proposes to pay secured creditors as secured only to the value of the property encumbered as determined by agreement or fixed by the Court pursuant to Section 57(h) of the Bankruptcy Act, 11 U.S.C., Sec. 93(h). Does this convert the plan into a composition? The Referee, the initial finder of facts, did not make a finding that the plan here involved was an extension rather than a composition. Indeed, he rightly assumed that this didn't have the slightest bearing on the ultimate legal question involved. It is not always possible to tell whether a plan involves an extension or a composition when the trustee is given the right to assume or reject executory contracts as in Paragraph 2 of this plan.

The Court's attention is directed to Paragraph 5 of the plan wherein it is provided that upon compliance by the debtor, with the provisions of this plan, the Court shall enter an order discharging the debts of creditors who will not accept payment under the plan. At page 11 of its opinion the Court suggests the problem of a second discharge is not likely to arise, whereas the problem is directly before the Court in this very case. The Court says such a discharge would be tantamount to transposing an extension plan into a composition. Yet the Court concludes its opinion by saying the petitioner's plan should have been confirmed despite the fact that under the Court's very reasoning the plan is a composition.

Comes Counsel for Commerce and states that this petition for rehearing is presented in good faith and not for delay.



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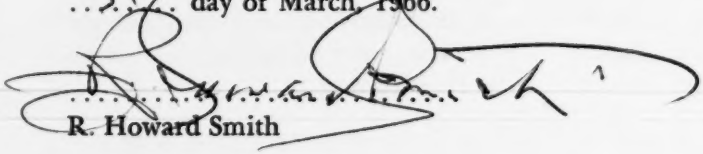
I certify that a copy of this petition for rehearing was served by mail upon counsel for the debtor, Robert J. Harris, 1809 First National Bank Building, Cincinnati, Ohio, and Howell W. Vincent, 130 Park Place, Covington, Kentucky, this 31 day of March, 1966.



R. Howard Smith